UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

IN RE: HIGH FRUCTOSE CORN SYRUP ANTITRUST LITIGATION	)	MDL NO. 1087 and
	)	Master File No. 95-1477
THIS DOCUMENT RELATES TO *Gray & Company v. Archer Daniels Midland Co. et al.*, No. 97-1203	)	

O R D E R

This matter is before the Court on Plaintiff, Gray & Company's ("Gray"), Motion for Supplemental Discovery. For the reasons stated herein, the Motion is GRANTED IN PART and DENIED IN PART.

Background

Gray, an opt-out Plaintiff, seeks to have Defendants -- Archer Daniels Midland Company ("ADM"), American Maize Products Company ("American Maize"), Cargill, Inc. ("Cargill"), AE Staley Manufacturing Company ("Staley"), the Hubinger Company ("Hubinger"), and Roquette America, Inc. ("Roquette") -- "supplement" their answers to discovery requests made by Gray on July 15, 1997, August 12, 1997, and January 6, 1998.

The July 15, 1997, discovery request was a Request for Production of Documents to Minnesota Corn Processors Cooperative ("Minnesota CPC"), CPC International, Inc., Roquette, Hubinger, and Golden Technologies Company, Inc. ("Golden Technologies"), of which only Hubinger and Roquette are still Defendants in this case. (Plt. Ex. 4). The August 12, 1997, discovery request was a Request for Production of Documents to ADM, Cargill, Staley, and American Maize ("Class Defendants"), all of whom are also Defendants in the companion class action lawsuit,

No. 95-1477. (Plt. Ex. 2). The July 15th and August 12th discovery requests sought information from Defendants for the period of January 1, 1980, "to present." Defendants objected to producing any information for that period of time after 1996. Gray did not file a motion for an order compelling Defendants to fully comply with the discovery requests.

The third and fourth discovery requests were served on all Defendants in the *Gray* case on January 6, 1998. (Plt. Ex. 3; Plt. Reply Ex. 1). These requests sought data from Defendants for the period of January 1, 1980, to December 31, 1997.

According to Defendants, negotiations over the scope of production subsequently ensued. Gray entered into a written agreement with Class Defendants, which provided, *inter alia*, that "Class Defendants will produce documents and answers to interrogatories for the same period as the class case: Jan. 1, 1988, through June 27, 1995, and Jan. 1, 1986, to Dec. 31, 1996, for data." (Dft. Ex. 2 at 2). According to Hubinger and Roquette's counsel, his clients entered into an identical oral agreement with Gray. (Dft. Suppl Ex., Rivkin Affidavit). Gray's counsel has no recollection of, and cannot find any documentary evidence in his files of any separate agreement with Hubinger and Roquette.

Gray now seeks in its Motion for Supplemental Discovery: (1) computer readable transactional invoice data for each Defendant for high fructose corn syrup ("HFCS") 42 and regular corn syrup for the years 1997 through 1999; and (2) documents or interrogatory answers sufficient to show each Defendant's best estimate of the grind and finish capacities for HFCS 42 and 55 and regular corny syrup for each of its plants and, to the extent available, for each plant operated by

Minnesota CPC, CPC International, ProGold LLC, and Golden Technologies Company, Inc. for each calendar quarter in the years 1997 through 1999. Prior to Gray filing its Motion for Supplemental Discovery, Gray had received the above data and information through December 31, 1996.

Gray's Motion was, at least according to Gray, precipitated by a battle of the experts in this case. One of Gray's experts, Professor Ed Whitelaw, issued an expert report in October of 1998 in which he concluded that various regression analyses he performed on Defendants' transactional data indicated a price-fixing conspiracy in the HFCS 42 and regular corn syrup markets. In February, 1999, Defendants expert, Professor Jeffrey Dubin, submitted a report in which he leveled many criticisms at Whitelaw's methodology and findings. Of the observations made by Professor Dubin, the following is at issue in the Motion for Supplemental Discovery:

> Professor Whitelaw's sample is very limited in duration to engage in the study he attempted. His analysis is based on a relatively short time period covering 1986 or 1987 through 1996. Ordinarily, this would not necessarily be too short a time frame for some analyses. However, the pre-alleged conspiracy period has fewer data observations than Professor Whitelaw's list of explanatory factors! *Moreover, I'm troubled that the alleged conspiracy period in the data[, 1989 through 1995,] is longer than the non-conspiracy period. This is a concern because it allows only a limited "control group" for comparisons*.

(Plt. Ex. 1 at 34) (emphasis added).

Gray asserts In its Memorandum of Law that if this Court were to decline its request for "supplemental" discovery that:

> Defendants in the *Gray* case not be allowed to use data and information for periods after 1996 in their defense or to argue that the opinions of Gray's expert should be

> discounted or rejected because they failed to take into account data and information for a sufficiently long period or for time periods after 1996. It would be fundamentally unfair if Defendants are allowed to withhold data and information for periods after 1996 but then use that data and information in their defense or criticize Gray's experts for failing to consider it.

(Plt. Mem. at 4).

This Order follows.

Discussion

Gray's request for information and data for 1997 through 1999 from Class Defendants is completely contrary to the agreements into which it entered with Class Defendants. The Court is at a loss to understand how Gray can come to this Court and label its Motion as one for "Supplemental Discovery" and argue that Class Defendants have a duty under Federal Rule of Civil Procedure 26(e) to provide additional or supplemental discovery when Gray stipulated with Class Defendants over two and one half years ago that the cut-off date for data production was December 31, 1996. This Court fully expects all parties to this action to honor their agreements and will not permit any party, absent a proper showing, to break such agreements. This, however, is precisely what Gray is attempting to do by seeking discovery for periods of time beyond the period specified in its agreement with Class Defendants, and it has failed to make a showing as to why this Court should not honor the parties' agreement.

Gray, however, argues in its Reply that the written agreement into which it entered with Class Defendants applies only to the August 12, 1997, discovery request and not to the January 6, 1998, discovery requests it served on all

Defendants. Even accepting this argument as true, it is of no help to Gray. In drafting the January 6, 1998, discovery requests to all Defendants, Gray limited the relevant time frame for data production to "January 1, 1985 to December 31, 1997." (Plt. Ex. 3; Plt. Reply Ex. 1). Nothing in these discovery requests imposes a duty to "supplement" discovery through 1999. Admittedly, the requests sought data through December, 1997, but the only data provided was through December 31, 1996. However, Gray never sought an order compelling Defendants to produce data through December, 1997. If Gray believed it was entitled to data beyond 1996 pursuant to the language of its January 6, 1998, discovery requests, it has waited too long to seek an order from this Court compelling such discovery.

The last discovery request at issue is the July 15, 1997, discovery request from Gray to, *inter alia*, Hubinger and Roquette. If, as Hubinger and Roquette contend, Gray entered into an oral agreement with them to limit the data cut-off date for this request to December 31, 1996, Gray would have no better ground to stand upon than it does with regard to its request that this Court order Class Defendants to "supplement" their responses to the August12, 1997, discovery request beyond December 31, 1996. The Court does not question the truthfulness of Hubinger and Roquette's counsel's representation that he entered into an oral agreement with Gray's counsel. Although Gray's counsel represents that he has no recollection of such an agreement, and the Court has no reason to doubt this representation as well, it would appear that such an agreement was reached given the fact that Gray has never before come to this Court seeking data beyond December, 1996. This is in spite of the fact that the July 15, 1997, discovery request was for information "to

present," *i.e.*, through July 15, 1997. One would think that if an agreement had not been reached between Gray and Hubinger and Roquette to limit data production through December 31, 1996, Gray would have at least prior to now sought to compel production of data through July 15, 1997.

The Court is disturbed by the fact that the agreement, given its potential importance to future discovery disputes such as this, was not memorialized. Good lawyering calls for memorialization of such an agreement. Nevertheless, even assuming there were no agreement between Gray and Hubinger and Roquette, the Court finds that pursuant to the clear language of Federal Rule of Civil Procedure 26(e) that Hubinger and Roquette were under no obligation, absent an order from the Court or upon discovering that a response to the July 15, 1997, discovery request was materially incomplete or incorrect, to provide information not yet in existence as of the date they answered the discovery request. As previously mentioned, Hubinger and Roquette did not provide data through July 15, 1997, and Gray did not seek and order compelling such data, thereby waiving any such argument for this data at this late stage of the litigation. Moreover, because as of July 15, 1997, information through December 31, 1999, was not yet in existence, Hubinger and Roquette were not and are not, absent an order from this Court, under any obligation to provide this data.

The Court recognizes that it has the authority under Rule 26(e) to order supplemental discovery. It declines to do so. With regard to the August, 1997, discovery request to Class Defendants, the Court chooses not to exercise its discretion to order additional discovery due to the agreement reached between Gray

and Class Defendants. Additionally, with regard to all four discovery requests at issue, the Court chooses not to exercise its discretion because Gray has not proffered any sufficient reason as to why it waited until June, 2000, to seek "supplemental" discovery. In its Reply brief, Gray argues:

> Gray's request should not be denied as untimely. Gray had good reason for waiting as long as it did before making its request. First, the significance of the period for which supplemental data and information is available is something that has developed gradually during the interlocutory appeals. No one event suddenly made it worth pursuing. Second, as class plaintiffs point out [in a motion of the same ilk as Gray's motion], it made sense to wait until a clear end was in sight (a likely resolution of the interlocutory appeals) to avoid piecemeal requests for additional data. Third, Gray admittedly did not want to seek its own data and information that even the class (which had equal need for the data and information) was not yet seeking.

(Reply at 4). If, as argued by Gray, the need for additional data "developed" during the interlocutory appeal process, then the Motion for Supplemental Discovery should have been filed during the nearly two years that this case was on interlocutory appeal, since this Court retained jurisdiction over matters in this case not related to the issues on interlocutory appeal. *See* 28 U.S.C. § 1292(b).[1] *At a minimum*, if Gray believed it was entitled to or needed data through December, 1999, it should have filed a motion to compel no later than January, 2000. Of course, this is generously assuming that Gray would have ever been entitled to obtain *three additional years of post-conspiracy period data*. Gray, like Class Plaintiffs, waited until the period of

[1] This Court certified the first interlocutory appeal on April 18, 1997, and received the mandate from the Seventh Circuit on December 12, 1997. The Court certified the second interlocutory appeal on April 27, 1999, and received the mandate on July 13, 2000.

discovery in this case has long been closed and when the end of this case is in sight to seek additional discovery. Such request is simply not reasonable under the circumstances. With regard to Gray's third argument – it was waiting for Class Plaintiffs to act first – the Court is equally unsympathetic. There is nothing that prohibited Gray from taking the initiative on this or any other issue.

The Court now turns to Gray's alternative requests. Defendants have represented to the Court that they have not and do not intend to rely on post-1996 data in this case. Accordingly, Gray's alternative request to prohibit Defendants from relying on such data is moot in light of this representation. Defendants, however, do not believe that their expert should be prohibited from criticizing Professor's Whitelaw's use of alleged insufficient post-conspiracy data in making his conclusions. Defendants cannot have the best of both worlds: objecting on the one hand to producing post-1996 data when it answered the discovery requests and arguing on the other hand that Whitelaw's conclusions are unreliable or erroneous because he should have analyzed data beyond 1996. Defendants shall not be allowed to level any criticism at summary judgment or at trial concerning Professor's Whitelaw's failure to use data not made available to him. The same conclusion applies equally to any attempt by Defendants to argue under *Daubert* and its progeny that Professor Whitelaw's opinions are unreliable because he did not have and therefore rely upon a sufficient amount of post-conspiracy data in reaching his conclusions.

Conclusion

For the foregoing reasons, Gray's Motion for Supplemental Discovery [#169-1, Case No. 97-1203] is GRANTED IN PART and DENIED IN PART.

ENTERED this 19th day of July, 2000.

(Signature on Clerk's Office Original)

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Michael M. Mihm
United States District Judge